Supreme Court, U.S.
FILED
AUG 28 1997
CLERK

No. 96-1934

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BEVERLY HEALTH AND REHABILITATION SERVICES, INC,

Petitioner,

v.

FREDERICK L. FEINSTEIN, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION

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ARGUMENT

1. The fallacy that pervades the General Counsel's Opposition is the illusion that the jurisdictional question presented by the Petition concerns "the propriety" of an administrative complaint. This is not a "run of the mill" prosecutorial discretion case. It is wholly unconcerned with the General Counsel's complaint issuance discretion. That discretion was exercised when the Agreement Petitioner seeks to enforce was entered. There is no discretion to refuse to honor the terms of that Agreement, and the District Court has jurisdiction to enforce the Agreement according to its terms.

The sole predicate for the assertion of federal district court jurisdiction is the Agreement between Beverly and the General Counsel. The Agreement arises under federal law, and, therefore, the lower court has "subject matter" jurisdiction conferred by 28 U.S.C. §§1331 and 1337(a) to determine Beverly's rights and the General Counsel's obligations ***under the Agreement***. Paragraph 7, thereof, expressly provides "that the General Counsel may choose to proceed to a hearing [*i.e.* issue an administration complaint] on any charges that are not settled."(App. 178a). None of the judicial precedents cited by the courts below and by the General Counsel (Br.4,5) involve a ***contract*** "arising under" federal law. In all these cases federal district court jurisdiction was asserted upon an administrative complaint issued by the General Counsel. Since that is not the case here, these authorities and the General Counsel's argument based upon them are irrelevant to the jurisdictional question presented.

However, the General Counsel, just like any other federal government official who enters into a contract under authority conferred by federal law, is subject to federal district court jurisdiction for breach of contract. The two administrative complaints issued against Beverly during the term of the Agreement are ***evidence*** of the General Counsel's breach of the

Agreement. They are not the predicate in and of themselves for federal district court jurisdiction. Petitioner concedes that without the Agreement, the administrative complaints would not provide federal court jurisdiction. The Opposition offers neither argument nor precedent to the contrary.

2. The Opposition refers to Beverly's seeking an "injunction", and thereby attempts to portray the jurisdiction question as judicial interference with complaint issuance authority. To the contrary, Beverly requests no "injunction" or any relief from prosecution. First, as we have noted, subject matter jurisdiction is exercised over the Agreement, not the administrative complaints. Second, to the extent the General Counsel ignored the pre-complaint procedures and pleading proscriptions promised Beverly by the Agreement, judicial authority is limited to breach of contract remedies. Thus, either the federal court could order specific performance and have the General Counsel re-process the unions' charges in conformity with the Agreement, or award damages. In either case no "injunction" against prosecution results.

3. The General Counsel misconstrues the application of *Leedom v. Kyne,* 358 U.S. 184 (1958) to the breach of contract jurisdictional question presented. As is evident Beverly does not claim a breach of a mandatory statutory duty owed Beverly under the National Labor Relations Act. Our argument is that this Court's reasoning in *Leedom* supports direct judicial review here. See Petition at p.20-21. Whether the General Counsel violates statutory or contract rights, he is accountable in federal district court, because the preservation of the sanctity of contract, by analogy to *Leedom*, is no less important a role for the federal judiciary than the protection of statutory rights directly involved in *Leedom.*

4. Unless parties, like Beverly, who enter into agreements with federal officials can obtain prompt judicial

evaluation of actions in cases presenting arguable breach of the official's contractual promises, federal officials will be able to deny an effective redress by forcing private parties to expend limited resources in perpetual administrative proceedings that can provide no timely or effective relief. Without "front end" accountability through up front judicial review, federal officials, like the General Counsel here, can with impunity nullify their own contractual promises. The Court of Appeals recognized and remedied this inequitable result in *Alabama Power Co. v. FERC*, 993 F.2d 1557 (DC Cir. 1993). Just as in that case, Beverly's injury resulting from the defense of two massive consolidated complaints is real, immediate, and continuing, with no pre- administrative hearing opportunity to determine the validity of Beverly's breach of contract claim. There is no rational basis for Beverly to endure some elusive opportunity to raise an "affirmative defense" available, if at all, ***after*** the General Counsel has denied Beverly the benefits of its contractual bargain.

5. As viewed by the courts below, the administrative review procedure trumpeted below is an empty vessel. The Agency's Administrative Law Judge denied Beverly any opportunity to obtain evidence in any form from the General Counsel's representatives about the application of the pre-complaint procedures specified in the Agreement to charges filed against Beverly during the Agreement's term. Then, not surprisingly, the ALJ granted the General Counsel's motion to strike the breach of contract defense. Without supporting evidence in the record, it is immaterial whether the ALJ or the Board, as blindly claimed by the D.C. Circuit (App. 11a), "revisits the matter": there is no evidence to review! Beverly has been denied the opportunity for discovery or to make an administrative record. This Court has long upheld direct judicial review where, as here, no factual record exists and discovery is foreclosed by the agency's procedural rules to

prevent such a record from coming into existence. *See,e.g., Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 212-13 (1994).

6. The Opposition's administrative exhaustion argument is also founded upon a faulty premise. District Court evaluation is sought of the Agreement, not the consolidated administrative complaints as the General Counsel insists(Opp. p.8). This case does not challenge a "final unfair labor practice order". It does raise contract issues and seeks relief the Labor Board simply has no authority to award. The judicial subject matter is exclusively the pre-complaint procedures agreed to by the General Counsel. If the General Counsel breached the Agreement, as Beverly contends, relief is limited to specific performance, that is, the application of the pre-complaint case handling procedures to charges filed during the term of the Agreement, not the dismissal of the administrative charges. Neither Beverly's breach of contract action nor the Agreement itself confer any judicial role over the decision to issue or not to issue an administrative complaint. Whether the General Counsel elects to re-process, dismiss, or settle the charges is entirely up to him. The Board itself has no authority or even "direct concern" to review or oversee the prosecutorial decisions relating to the pre-complaint procedures, requested relief, or the form of pleadings adopted or filed by the General Counsel. In 1947 Congress separated the Agency's prosecutorial and adjudicatory functions. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975). As the Board has no adjudicatory role over these matters, it follows that the Board can claim no "expertise" in determining whether the General Counsel abides by his contracts. This is a historic role for the federal judiciary, and to interpose administrative exhaustion in

this breach of contact case effectively nullifies Beverly's contract rights.[1]

7. The Opposition does not dispute or even question the significant and far-reaching aspects of the Petition that justifies certiorari within Rule 10 of the Rules of this Court. Beverly's Agreement with the General Counsel is but one of the "enormous variety" of similar contracts between federal agencies and regulated parties. These contracts arise under federal law within the literal scope of 28 U.S.C. §1331 and §1337(a). The mutual promises and obligations create property rights that can be unilaterally nullified by the signatory federal official, as happened here. The timely enforceability of property rights, such as Beverly's, is, as Justice Souter stated in *United States v. Winstar Corp.*, 518 U.S.___, 116 S.Ct. 2432, 2459 (1996), as important to the "Government's own long-run interests as a reliable contracting partner. . . ." as it is to the regulated parties. Congress granted original jurisdiction to the federal district courts pursuant to 28 U.S.C. §1331 over alleged breaches of this category of property rights. The Court of Appeals erred by denying Beverly and all other present and future contracting parties in regulated industries timely recourse to the federal forum Congress provided.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition pps.8-22, this Court should issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit.

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[1] There is no substance to the inference (Opp. p.3) that the prolonged charge "stockpiling" and peculiar consolidations on the extraordinary scale evident here complies with the Agreement. To the contrary, the contracting parties agreed to end these procedures in any future case (App. 176a-177a).

Respectfully submitted,

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